

Response to Comments

General Waste Discharge Requirements for Discharges of Waste from Irrigated Agricultural Lands for Dischargers that Are Members of a Coalition Group in Bard Valley, Imperial County (Bard Valley General Order)

Tentative Order R7-2019-XXXX

Comment Deadline: May 31, 2019

Comment Letter #	Date	Commenter	Affiliation
Bard Unit Coalition Group -1	4/12/2019	Mark Stover	President, Bard Unit Coalition Group
Bard Unit Coalition Group -2	5/15/2019	Mark Stover	President, Bard Unit Coalition Group
Brownstein Hyatt Farber Schreck -3	5/24/2019	Mack Carlson	Attorney representing Anthony Costa and Sons, a Bard Valley landowner
Bard Unit Coalition Group -4	5/29/2019	Mark Stover	President, Bard Unit Coalition Group
Imperial County Farm Bureau -5	5/31/2019	Brea Mohamed	Executive Director, Imperial County Farm Bureau

Changes proposed in response to comments are incorporated into the draft WDRs as revised on June 28, 2019, unless otherwise noted.

Comment #	Comment	Response
BUCG - 1.1	"What this proposal represents is a mandate to implement management policies developed in other areas without consideration of the historical success of members of the Bard Unit Coalition Group, the complexities regulating surface and groundwater, the resulting successes of management practices or a focus of resources towards identifying solutions on the opportunities for improvement that truly exist."	<p>Staff disagrees with this comment. When developing the Bard Valley General Order, Regional Water Board staff considered the unique local soil, geology, topology, hydrology, pesticide use, and agricultural commodities of Bard Valley.</p> <p>Staff also reviewed surface water quality data submitted with Bard Unit Coalition Group's (Bard Coalition) Annual Monitoring Reports, surface water data collected by the State Water Board's Surface Water Ambient Monitoring Program, groundwater data and reports prepared by the U.S. Geologic Survey and the California Department of Water Resources, and pesticide use reports collected by the California Department of Pesticide Regulations to provide a transparent assessment of water quality issues in the Bard Valley. This analysis is summarized in Attachment A of the Bard Valley General Order.</p>

Comment #	Comment	Response
		To the extent that this comment objects to the precedential nature of the Eastern San Joaquin Order, ¹ the comment would be best directed to the State Water Board. The Regional Water Board is unable to change the precedential nature of certain requirements in the State Water Board's order.
BUCG - 1.2	<p>“As noted in the background sections of the draft order, there are approximately 14,676 acres of irrigated agricultural lands within the Bard Valley in Imperial County. Of those, approximately 7,120 acres are located on privately owned deeded land (Bard Unit), and approximately 7,556 acres are located on reservation land (Indian Unit) of the Fort Yuma Quechan Indian Tribe (which the State of California has no regulatory authority). On the Arizona side of the Colorado River, there are 53,415 acres of agricultural land who's surface water and groundwater are co-mingled with those of the Bard Unit as well as those of the Indian Unit.</p> <p>As noted in the Hydrological setting item 38: 'There are no known barriers to the movement of groundwater except localized clay layers, which may obstruct the downward percolation of water' the hydrology of this area is effectively 68,000 acres which is co-mingled of which the order is attempting to manage 7,120 acres. While this poses complications to managing surface water, (Hydrological setting item 41 'Approximately 12.3 miles of open drains are located in the Bard Unit. Of these 12.3 miles, 4.66 miles are shared drains that contain comingled water from Tribal Lands and Imperial Irrigation District'), it does not address or account for effects of water from Tribal Lands on the co-mingled waters. Additionally, the co-mingling of groundwater and the minor landholdings of the Bard Unit landowners relative to the overall basin raises the question of the overall impact of any management practices imposed on landowners in Bard to the overall water quality in the Basin.”</p>	<p>Comment noted.</p> <p>The Bard Valley General Order prohibits waste discharges from Irrigated Agricultural Lands in the Bard Unit of the Reservation Division of the U.S. Bureau of Reclamation's Yuma Project from causing or contributing to an exceedance of applicable water quality objectives. The Order does not require covered agricultural dischargers to cure legacy pollution or pollution generated by other categories of dischargers.</p> <p>If monitoring data indicates that a water quality problem exists, a Water Quality Restoration Plan (WQRP) may be required, as provided in Section E.6 of the Bard Valley General Order. One element of the WQRP is identification of known or suspected sources of the pollution. Impacts from known or suspected sources on tribal land in the Indian Unit of the Reservation Division or irrigated agricultural lands in the State of Arizona may be investigated and taken into account.</p> <p>Staff note that many growers in the Bard Unit of the Reservation Division also farm irrigated agricultural lands in the Indian Unit and in Arizona, and that many of the same management practices are used in all of these areas.</p>

¹ “Eastern San Joaquin Order” refers to State Water Board Order WQ 2018-0002, *In the Matter of Review of Waste Discharge Requirements General Order No. R5-2012-0116 for Growers Within the Eastern San Joaquin River Watershed that are Members of the Third-Party Group*, dated February 7, 2018. Available at: https://www.waterboards.ca.gov/board_decisions/adopted_orders/water_quality/2018/wqo2018_0002_with_data_fig1_2_appendix_a.pdf (as of June 28, 2019).

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BUCG - 1.3	<p>“Item 44 in the Hydrologic setting indicates ‘most constituents detected were below the Primary and Secondary Maximum Contaminant Levels (MCLs) found in California Code of Regulations, title 22, section 64421 et seq. Total dissolved solids, chloride, iron, manganese, and sulfate were measured above the Secondary MCLs. The predominant cation present in groundwater was sodium, and the predominant anions were chloride and sulfate. TDS concentrations ranged between 1,380 and 1,970 milligrams per liter (mg/L).’ these are naturally occurring elements who’s elevated levels cannot be directly attributed to agricultural practices in the Bard Valley.”</p>	<p>The groundwater analysis in Attachment A of the Bard Valley General Order is an assessment of the current status of groundwater in the Bard Valley. By comparing the water quality at sampling locations inside of Bard Valley to those outside of the valley, staff attempted to show how discharges from Irrigated Agricultural Lands may be affecting groundwater quality.</p>
BUCG - 1.4	<p>“Item 60 in the Basin Management Plan ‘indicates the compliance cost estimates for The Bard Unit Coalition to be are \$59,291-120,939 for the first year and \$54,291-110,939 for subsequent years. Expressed on a per-acre basis, the estimated costs amount to \$9.19-18.75 per acre for the first year, and \$8.41-17.20 in subsequent years.’</p> <p>Current costs for grower compliance in the Central Coast of California which were required to implement similar management practices under tier three of versions 2 and 3 (previous and existing Ag order) are between \$90 and \$100 per acre annually. This information was presented to the Region 3 Water Board for consideration in January 2018.”</p>	<p>Comment noted. Under Water Code sections 13263 and 13241, “economic considerations” is one of the factors the Regional Water Board must consider when issuing waste discharge requirements. Additionally, section 13267 requires the Regional Water Board to ensure that “the burden, including costs, of [monitoring] reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports.” Significant uncertainties in several key areas of the program prevent the precise estimation of program costs. However, the Bard Valley General Order as drafted does consider the estimated costs of compliance with the permit requirements in Section IV, “Economic Considerations” of the Fact Sheet, which is in Attachment A of the Order.</p> <p>The costs of compliance for the Bard Valley General Order should vary greatly from the Central Coast Water Board’s Agricultural Conditional Waiver at the Tier 3 level. The Central Coast Water Board has organized its agricultural regulatory program much differently than the Colorado River Basin Region; for example, in the Central Coast Region, agricultural dischargers work directly with Board staff, and coalitions organized only for monitoring surface or groundwater.</p>

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		<p>Additionally, the Central Coast Water Board's Tier 3 classification applies to dischargers who discharge the highest level of waste or pose the greatest potential to cause or contribute to an exceedance of water quality objectives. Tier 3 monitoring and reporting requirements are significantly different than those required in the Bard Valley General Order, including requirements for edge-of-field discharge monitoring.</p>
BUCG - 1.5	<p>"The [irrigation and nitrogen management and reporting] information requested is being requested to a field-specific level. However, Discharge, by definition, is when the material in question leaves the boundaries of the owner's property. The request for information at a field-specific level exceeds the scope of the discharge reporting and creates an excessive amount work to prepare regulatory compliance work in situations where there are multiple crops produced per year on the same land."</p>	<p>The requirement to submit field-level data to the Regional Water Board implements a precedential requirement of the Eastern San Joaquin Order. (ESJ Order, p. 23.) Both the Bard Valley General Order (in Footnote 8) and the Eastern San Joaquin Order (in Footnote 88) explain that Members may report data for a portion of a field or for multiple fields provided that the reported area has (1) the same crop type, (2) the same fertilizer inputs, (3) the same irrigation management, and (4) the same management practices, provided that in no case should a reported area exceed a total size of 640 acres, and different crop types must always be reported separately even if they are within the same reporting area.</p> <p>Monitoring and reporting data at too general of a level fails to achieve the feedback mechanism required by the Nonpoint Source Policy.² (See ESJ Order, p. 23.) While the Nonpoint Source Policy allows reliance on management practice implementation to control sources of nonpoint source pollution, the policy requires a feedback mechanism whereby the implementation requirements are linked to expected water quality outcomes, and the program is adaptively managed to institute improved management practices where additional measures are needed to meet the water quality requirements. (See NPS Policy, Key Elements 2 and 4; ESJ Order, p. 31.)</p>

² "Nonpoint Source Policy" means the State Water Board's *Policy for the Implementation and Enforcement of the Nonpoint Source Pollution Control Program* dated May 20, 2004. Available at <https://www.waterboards.ca.gov/water_issues/programs/nps/docs/plans_policies/nps_iepolicy.pdf> (as of June 28, 2019).

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		<p>In the Eastern San Joaquin Order, the State Water Board explained that reporting at the field level, rather than only in aggregated and summary form, will lead to more effective oversight and management of the irrigated lands program, as well as provide more transparency for the public as to the overall level of management practice implementation to determine whether the program is achieving its water quality goals, or whether additional regulatory actions are necessary. (ESJ Order, p. 23.)</p> <p>However, the Eastern San Joaquin Order provides some additional flexibility for growers in areas with highly intensive cropping practices, including multiple rotations of different crops in the same location within a single year, unpredictable crop types and harvesting based on rapidly-shifting market demand, and variable management practices adjusting to weather and field conditions. (ESJ Order, p. 31, fn. 88.) The regional water boards have the flexibility to develop alternative reporting areas for these types of growers, as long as the regional water board determines that the alternative reporting area provides meaningful data and balances the level of detail with the reporting burden similar to the field approach. In no case should a reported area exceed a total size of 640 acres, and different crop types must always be reported separately even if they are within the same reporting area, to allow for evaluation of the effectiveness of management practices with regard to each individual crop type grown. (<i>Id.</i>)</p> <p>In response to this comment, the Regional Water Board proposes to insert a new Footnote 9 under Section D.3.c of the Bard Valley General Order, as follows:</p>

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		<p>“The Regional Water Board’s Executive Officer may also approve alternative reporting areas for Dischargers in areas with highly intensive cropping practices, including multiple rotations of different crops in the same location within a single year, unpredictable crop types and harvesting based on rapidly-shifting market demand, and variable management practices adjusting to weather and field conditions. The alternative reporting area must provide meaningful data and balance the level of detail with the reporting burden similar to the field approach. In no case should a reported area exceed a total size of 640 acres, and different crop types must always be reported separately, even if they are within the same reporting area, to allow for evaluation of the effectiveness of management practices with regard to each individual crop type grown.”</p>
BUCG - 1.6	<p>“[V]egetable production is a highly competitive business as such yield data traditionally has been a proprietary trade secret. Disclosing this information in a public forum will degrade the market structure and result in a negative economic impact to the industry as a whole.”</p>	<p>In the Eastern San Joaquin Order, the State Water Board specifically addressed and rejected the argument that data in the INMP Summary Report includes trade secrets, finding:</p> <p>We also note here that we are not persuaded that the INMP Summary Report data constitutes proprietary business information. In Order WQ-2013-0101 we similarly rejected the argument made by some petitioners that total nitrogen applied is sensitive proprietary information not appropriate for reporting and deferred to the protections for sensitive business information created by the Legislature in the Water Code and the Public Records Act, rather than carve out additional exceptions within the permit. In that case, we required each discharger to report total nitrogen applied directly to the Central Coast Water Board and noted that the timing and frequency of nitrogen applications, rather than data regarding the total amount, was more likely to implicate competitive business practices. The additional information required to be reported here, i.e. the nitrogen removed from the field, does not significantly alter the balance that we must strike between the need for transparency and</p>

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		<p>measurable benchmarks on the one hand, and the need for the agricultural community to protect trade secrets and other sensitive information on the other hand.</p> <p>(ESJ Order, p. 46; see also State Water Board Order WQ 2013-0101, p. 45, fn.103.) Relevant code provisions on proprietary and trade secret information protection are found in Water Code section 13267, subdivision (b)(2), Government Code section 6254, subdivision (k), and Evidence Code section 1060.</p> <p>In the Eastern San Joaquin Order, the State Water Board noted that concerns with privacy and protection of proprietary information provide an incentive for growers to work with Coalition Groups, as the Coalition Group retains most information on farm-level management practice and water quality performance rather than submitting that information to the regional water board and, by extension, making it available to the public. (ESJ Order, p. 21.)</p> <p>Here, the Bard Valley General Order requires that the Farm Plan data and INMP Summary Report data be submitted to the Regional Water Board by the Bard Coalition with anonymous Member identifiers and anonymous APN identifiers. The Farm Plans and INMP Summary Reports themselves are submitted by the Members to the Bard Coalition, not to the Regional Water Board. The Bard Coalition fulfills the role of collecting data on the management practices that are implemented by the Members. The Bard Coalition in turn reports the information in these plans to the Regional Water Board, without Member identification or location information (except in the case of township-level aggregated data).</p> <p>To the extent that the Regional Water Board may request more specific Member information that may be considered proprietary or trade secret, for example, through a Water Quality Restoration Plan (WQRP), the Bard Coalition and/or an individual grower should clearly indicate whether all or a portion of the information provided to the Regional Water Board is</p>

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		<p>asserted to be exempt from public disclosure. Regional Water Board staff will determine whether any such report or portion of a report qualifies for an exemption from public disclosure. If the Regional Water Board staff disagrees with the asserted exemption from public disclosure, the Regional Water Board staff will notify the Bard Coalition and grower prior to making such report or portions of such report available for public inspection.</p> <p>For clarity, staff proposes to add a new Section F.10 to the Bard Valley General Order as follows:</p> <p><u>“Claims for Exemption from Public Disclosure.</u> If the Coalition Group and/or a Discharger asserts that all or a portion of a report submitted pursuant to this Order is subject to an exemption from public disclosure (e.g., due to proprietary or trade secret information), the Coalition Group and/or Discharger must provide an explanation of how those portions of the reports are exempt from public disclosure. The Coalition Group and/or Discharger must clearly indicate on the cover of the report (typically an electronic submittal) that all or a portion of the report is exempt from public disclosure, submit a complete report with those portions that are asserted to be exempt in redacted form, submit separately (in a separate electronic file) unredacted pages (to be maintained separately by staff). Regional Water Board staff will determine whether any such report or portion of a report qualifies for an exemption from public disclosure. If staff disagrees with the asserted exemption from public disclosure, staff will notify the Discharger prior to making such report or portions of such report available for public inspection.”</p>

Comment #	Comment	Response
BUCG - 1.7	<p>“While the East San Joaquin (ESJ) Waste Discharge Requirements (WDR), as revised by the State Water Board, contains precedential requirements for nitrogen management because ‘nitrate pollution in groundwater is a significant public health threat in parts of the Central Valley’ and other areas of the state, the ESJ WDR recognizes that its specific nitrogen management requirements should not uniformly apply statewide due to uniquely-situated growers and geographic areas. (ESJ WDR, p. 34). State Water Board recognized that areas, exist in which surface waters and groundwater basins do not suffer from significant nitrate contamination...</p> <p>As evidenced throughout the Draft WDR and Attachments, groundwater quality data taken from the Bard Unit indicate that most constituents detected are in concentrations below the Primary and Secondary Maximum Containment Levels. (See Draft WDR, Finding 43; Attachment A Table 2.2, p. 8). In regard to nitrate detections, the levels are significantly below the primary MCL of 10 mg/L. (Id.) Evidence also indicates that nitrate detections in Palo Verde area surface water quality data are below the primary MCL of 10 mg/L. (Attachment A Table 2.1, p. 5). Given this data, a “demonstration” has been made “that nitrogen applied to the fields does not percolate below the root zone in an amount that could impact groundwater and does not migrate to surface water through discharges.” (ESJ WDR, p. 34) Therefore, the Draft WDR should incorporate the exemption from nitrogen management requirements and should be revised accordingly. If at some point in the future groundwater or surface water concentrations are exceeded, the areas upstream from the area in question should begin reporting.”</p>	<p>This comment mischaracterizes the basis for the precedential nitrogen management planning and reporting requirements in the Eastern San Joaquin Order. The stated basis is <u>not</u> nitrogen pollution in the Central Valley Region. Rather, in making nitrogen management planning and reporting precedential statewide, the State Water Board relies upon the findings of an agricultural expert panel, which found: “Because deep percolation of nitrates is universal within irrigated agriculture, a good regulatory program must encompass all irrigated areas, not only lands directly above high nitrate aquifers, those previously identified to be in a high vulnerability area, or those with a certain farm or field size.” (ESJ Order, p. 25.) The State Water Board proceeds to explain, “In most instances, groundwater is vulnerable to agricultural nitrate impacts, regardless of the time it takes for those impacts to appear in groundwater due to soil conditions, geologic conditions, and/or depth to groundwater.” (<i>Id.</i> at pp. 25-26.)</p> <p>The State Water Board’s only wholesale exemption from the nitrogen planning and reporting requirements is for those growers who can demonstrate “applied nitrogen is not expected to seep below the root zone in amounts that could impact groundwater and is further not expected to discharge to surface water.” (ESJ Order, p. 27.) The exemption is <u>not</u> based on whether “surface waters and groundwater basins do not suffer from significant nitrogen contamination,” as asserted in the comment. Rather, as noted above, the State Water Board explicitly found that even those areas that do not appear vulnerable to severe agricultural nitrate impacts should be subject to the precedential nitrogen planning and reporting requirements. (ESJ Order, pp. 25-26.)</p> <p>Further, Regional Water Board staff have reviewed available water quality data and reports for the Bard Valley area and concluded that there is insufficient information at this time to demonstrate that nitrogen applied to the fields (1) does not percolate below the root zone in amounts that could impact groundwater and (2) does not migrate to surface water through</p>

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		<p>discharges, including drainage, runoff, or sediment erosion.</p> <p>Regional Water Board staff will not be making a determination in the Bard Valley General Order itself whether the exemption (which is found in Footnote 8 of Section D.3.b of the Bard Valley General Order) applies to agricultural dischargers in the entire Bard Valley area. Rather, the Bard Coalition should make a separate demonstration to Regional Water Board staff if it believes that a certain category of growers (based on geography or crop type) qualifies for the exemption.</p> <p>A comprehensive demonstration or study linking groundwater and surface water data to the conditions of the crop management and the local conditions (soil, geology, topology, hydrology) would likely be required. Staff suggests that the exemption proponent perform the following two step approach:</p> <ul style="list-style-type: none"> a) Collect data and information to demonstrate that the criteria for the exemption are met; and b) Submit a request for exemption from the INMP requirements with a reasoned rationale and discussion of the relevant data for Regional Water Board staff to review. <p>Regional Water Board staff will review the request for exemption and recommend a decision to the Regional Water Board's Executive Officer. Once the Executive Officer makes a decision to approve or disapprove the request, the stakeholder has the option to appeal the decision to the State Water Board.</p> <p>Any exemption demonstration should describe how nitrogen is currently being managed, identify the types and amounts of nitrogen being applied, as well as the fate and transport of the applied nitrogen. At present, there is no comprehensive accounting of the amounts of applied nitrogen or their fate and transport. If nitrogen is applied to irrigated agricultural lands, conservation of mass dictates that this nitrogen is either being built up somewhere in the area or is lost. The reviewed data indicates that some of the applied nitrogen migrates to surface waters, but the fate of the remainder of the nitrogen is unclear.</p>

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		<p>Additionally, there is insufficient data, due to a lack of shallow groundwater data, which prevents the determination of the full extent of any nitrogen impacts to groundwater. Only data from relatively deep wells in Bard Valley area was available for review by Regional Water Board staff. The typical depth of first-encountered groundwater in the area ranges from 6 to 18 feet below the ground surface, while the reported screening levels of the wells used in staff's analysis discussed in the draft Bard Valley General Order ranged from 129 to 467 feet below the ground surface. In an area where there are a few barriers to prevent the movement of the applied water to groundwater, it makes sense that shallow groundwater should indicate if there are nitrate problems. Monitoring of shallow, first-encountered groundwater allows identification of changes in groundwater quality from activities on the surface at the earliest possible time. Regional Water Board staff has not seen nitrogen data from shallow wells from multiple years that is sufficiently representative of the entire farmed area in Bard Valley.</p> <p>Further, as mentioned above, there is indication that applied nitrogen is discharged to surface water from Irrigated Agricultural Lands in the Bard Valley. Staff reviewed nitrogen in surface water data reported by the Bard Coalition from 2015 through 2018. Staff observed elevated levels of nitrogen when comparing source water nitrogen concentrations to drainage concentrations. For nitrates, the source water concentrations ranged from 0.2 to 0.4 milligrams per liter, while drainage concentrations ranged from 1.1 to 6.5 milligrams per liter. While these concentrations are below the drinking water Primary Maximum Contaminant Level (MCL) of 10 milligrams per liter, they are above source water levels and indicate that applied nitrogen may be discharging to surface waters. This finding is also indicated by the 2019 report prepared by Dr. Charles Sanchez, which shows elevated concentrations of nitrate-nitrogen in waters downstream of the Bard Unit in the Reservation Main Drain, when compared to the upstream</p>

Comment #	Comment	Response
		diversion. ³
BUCG - 1.8	<p>“Regarding attachment A: For Clarification, the Water Board does not hold the authority to specify which or how much pesticides or fertilizers can be applied to a given parcel of land. The Water Board can set limits on the concentrations which leave the landowners property into the public domain. It is the obligation of the landowner to meet those requirements. Pesticide labels are legal documents approved by the Federal Environmental Protection Service whose regulations and restrictions can be enhanced by the California Department of Pesticide Regulation. If the Regional Water Board has issues with specific pesticide exceedances in groundwater or surface water, the Regional Water Board should work to address this by working with the appropriate State and County authorities to remedy the situation with growers.”</p>	<p>Under the Porter-Cologne Water Quality Control Act (Water Code, § 13000 et seq.) and the federal Clean Water Act (33 U.S.C. § 1251 et seq.), the State Water Board and regional water boards have been designated the principal state agencies with primary responsibility for the coordination and control of water quality in California.</p> <p>Regional water boards have the authority to regulate the discharge of waste, from both point and nonpoint sources, which could affect the quality of the waters of the state. (Water Code, §§ 13260, 13263.) “Waste” is broadly defined to include “sewage and any and all other waste substances...from any producing, manufacturing, or processing operation...” (<i>Id.</i> § 13050(d).)</p> <p>With respect to pesticides, “waste” has been held to include insecticides, pesticides, herbicides and other chemicals used for the control of insects, rodents, and diseases on farmland, brushland, forestland, and farm buildings to the extent that these substances find their way into waters of the state after their use for agricultural purposes. (43 Cal. Ops. Atty. Gen. 302, 304 (1964); see also <i>Nat’l Cotton Council of Am. v. U.S. E.P.A.</i> (6th Cir. 2009) 553 F.3d 927, 936 [holding excess pesticide and pesticide residue are “pollutants” that can be regulated under the Clean Water Act].)</p> <p>While the regional water boards do not regulate the amount of pesticides or fertilizers applied to irrigated agricultural lands, they do regulate the discharge of residuals pesticides and fertilizers to groundwater and surface waters. Water quality objectives for these types of wastes can be developed by the regional water boards as part of the basin planning process. For example, the Central Valley Water Board has adopted Total Maximum Daily Loads (TMDLs) for pesticides diazinon and</p>

³ This refers to an unpublished report prepared by Dr. Charles Sanchez from the University of Arizona titled, *Current Agricultural and Environmental Situation in the Bard Water District*, submitted on behalf of the Bard Coalition during the Bard Valley General Order public workshop held on May 15, 2019.

Comment #	Comment	Response
		<p>chlorpyrifos for certain surface water bodies, which contain load allocations for irrigated agricultural discharges. Most regional water boards, including the Colorado River Basin Water Board, have narrative water quality objectives for toxicity.</p> <p>The Bard Valley General Order does not regulate the amounts or types of applied pesticides or fertilizers. However, degradation or exceedances of water quality objectives in surface waters or groundwater caused by pesticide or fertilizer discharges from Irrigated Agricultural Lands could be potentially addressed through a Water Quality Restoration Plan. The Regional Water Board is not obligated to go through another state or local agency to initiate this process.</p>
BUCG – 1.9	“The order specifies that Regional Water Board has access for inspection to private property. This should be changed to the Regional Water Board can request access for inspection, if this is denied and they have probable cause, they can seek a warrant to enter the property.”	<p>Please see the response to comment BHFS-3.6.</p> <p>Regional Water Board staff will not enter a property without consent, unless staff first obtains a warrant.</p>
BUCG - 2.1	<p>“This proposal identifies the comingling of surface waters in the Drains with Tribal Lands but fails to identify how the monitoring practices will be structured to isolate the effects of specific practices on private landowners to groundwater from the majority of the potential contributors...</p> <p>[The Bard Valley General Order] does not address or account for effects of Water from Tribal lands on the co-mingled waters. Additionally, the co-mingling of groundwater and the minor landholdings of the Bard Unit landowners relative to the overall basin raises the question of the overall impact of any management practices imposed on landowners in Bard on the overall water quality in the Basin. These factors greatly confound the interpretation of any groundwater monitoring or accountability for impacts in the Bard valley.”</p>	Please see the response to comment BUCG-1.2.
BUCG - 2.2	“In consideration of the specific constituents listed for sampling listed in the monitoring parameters for surface water in Attachment	When identifying groundwater monitoring pesticide constituents, staff queried California Department of Pesticide Regulation’s

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	<p>B, (Section III-B table 2) and Groundwater Monitoring (Section IV-A table 3), it requires testing for Dimethoate. A review of California DPR pesticide application records indicate that only 0.91 gallons of Dimethoate were applied in 2016 in all of the Bard Unit area and records indicate that none was applied in the Bard valley during 2017 or 2018. As the application restrictions around this material have increased in recent years the use of this material has been replaced by safer, more effective materials.”</p> <p>“As Dimethoate applications in the Bard Valley have been phased out over the last several years we respectfully request that the testing requirements for Dimethoate be removed from both the surface and groundwater testing requirements in the Ag order.”</p>	<p>(CDPR) CalPIP Database for pesticide usage in the Bard Unit of the Reservation Division for the years 2012 through 2016, and CDPR’s list of pesticides designated as having the potential to pollute groundwater. From 2012 through 2016, dimethoate was identified as one of the top ten pesticides used in the Bard Unit. The CDPR has also identified dimethoate as a pesticide with a significant potential to contaminate groundwater. However, in light of the information brought forth in this comment letter, staff agree that the amounts of this pesticides used are low.</p> <p>In response to this comment, staff propose deleting dimethoate as a constituent for surface and groundwater monitoring. Staff proposes revising the following tables in Attachment B of the tentative Order as follows:</p> <p>Section III-B, table 2, Page 4 of 14:</p> <p>“... Dimethoate ...Laboratory...Semi-annual (March and October)... 43 µg/l⁴”</p> <p>and</p> <p>“⁴ µg/l = micrograms per liter”</p> <p>and Section IV-A, table 3, Page 6 of 14:</p> <p>“... Dimethoate ...Laboratory...Annually... 43 µg/l⁴”</p>

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BUCG - 2.3	<p>“While Pendimethalin is applied to a broader number of acres in the Bard Valley of California (Table 1), it is important to consider the details surrounding the application of this material in the Bard Valley. In 2016, 2017 and 2018 respectively there were 1386.74, 1047.6 and 90.74 acres treated. The highest percentage acreage treated was less than 10 % of the total potential acres on any given year in the Bard area. In considering the application of Pendimethalin, it is critical to consider the crop rotation program used in this valley. Records for the last 3 years indicate that Pendimethalin applications were only applied to Cotton and Wheat. These crops are used rotation with Vegetables and Melons. Due to the rotational timelines on any given field, the repeated application to any one parcel would limited to approximately one application every 3-5 years.”</p> <p>“For Glyphosate applications in all three years were limited to Cotton and ‘uncultivated areas’ which include ditchbanks roadside areas, and fallow ground which are not irrigated. Additionally, the majority of applications are made from late Spring through August when surface applied products are broken down through photodegradation and Biodegradation are the most rapid rate. Due to the areas and timings that Glyphosate applications are made in the Bard valley, the potential for increased degradation is high and the potential for movement away from the point of application in minimal.”</p> <p>“These considerations combined with the nature of the crop rotations in the Bard valley, the low percentage of acres treated with Pendimethalin and Glyphosate, we respectfully request that the testing for Pendimethalin and Glyphosate be removed or limited to once every 5 years.”</p>	<p>When identifying surface and groundwater monitoring pesticide constituents, staff queried CDPR’s CalPIP Database for pesticides usage in the Bard Unit of the Reservation Division for the years 2012 through 2016, and reviewed Coalition monitoring reports reporting concentrations of pesticides. Based upon pesticide use data reports, the herbicides glyphosate (Roundup) and pendimethalin, among others, are currently among the most used pesticides in the Bard Unit. The Bard Coalition monitored the concentrations of these pesticides in surface water from June 2015 to present. Glyphosate has not been detected. Pendimethalin was detected in four samples collected in 2016-2017, three times in the upstream All-American Canal and once in Drain # 7. Concentrations found were low (All-American Canal average 3.4 ng/L, Drain # 7 2.0 ng/L). Staff agree that the amounts of these pesticides used and the concentrations of pesticides in area surface and groundwater are low.</p> <p>In response to this comment, staff propose deleting pendimethalin and glyphosate as constituents for surface water monitoring. Staff proposes revising Attachment B of the tentative Order Section III-B, table 2, Page 4 of 14 as follows:</p> <p>Section III-B, table 2, Page 4 of 14:</p> <p>“... Glyphosate ... Laboratory ... Semi-annual (February & April)...”</p> <p>and:</p> <p>“... Pendimethalin ... Laboratory ... Semi-annual (February & April)...”</p>

Comment #	Comment	Response
BHFS - 3.1	<p>“To avoid the potential that a template adopted later in time is not consistent with the final order it implements, draft reporting templates should be made available to the public before approval and implementation of the associated order. We request that the Draft Order establish a clear, public process for the development and release of reporting templates to ensure the regulated community has input on the reporting methods.”</p>	<p>The Bard Valley General Order specifies in detail the required elements of the templates for the Farm Plan, INMP, INMP Summary Reports, and Drinking Water Notification. Regional Water Board staff will work with the Bard Coalition, which represents the interests of its Members, to develop these planning and reporting templates. Review of the template and the associated action by the Executive Officer will be based on findings as to whether the template meets applicable requirements and contains all of the information required by the Bard Valley General Order.</p> <p>The Regional Water Board expects that the Bard Coalition will share proposed templates with its Members and obtain feedback prior to finalization of the template and presentation to the Regional Water Board’s Executive Officer for approval. At this time, the Regional Water Board does not intend to provide any official public comment period on the templates prior to approval.</p>
BHFS - 3.2	<p>“[T]he Draft Order says “[i]f desirable, differing templates may be created for different agricultural commodity groups.” (Draft Order, p. 20.) The Draft Order is unclear about whether the Executive Officer, the Board, or the coalition, or the regulated entity makes this decision. Different templates for commodity groups will be important due to the variety of crops grown and variability in the number of annual cropping cycles in the Bard Valley. We request that the Board clarify the process for making different agricultural commodity group template determinations.”</p>	<p>Sections D.2.c and Section 3.D.c of the Bard Valley General Order state that the Regional Water Board’s Executive Officer makes the final decision to approve the templates. The Bard Coalition or any discharger or category of dischargers may propose templates. However, the Regional Water Board recommends that dischargers work through the Bard Coalition if at all possible.</p> <p>Please also see the response to comment BHFS-3.1.</p>
BHFS - 3.3	<p>“Section E.3.b (Membership Reporting) requires that the coalition disclose the identities of members to the Board when the member ‘failed to implement improved water quality management practices[.]’ (Draft Order, p. 19.) Compared to the other items in the list, which are binary determinations about whether a member submitted information, this disclosure appears to give the coalition discretion to evaluate a member’s water quality management practices. It is unclear how a coalition will make this determination, and whether a coalition will provide the member notice and an</p>	<p>This particular provision of the Bard Valley General Order applies only when a Member fails to implement improved management practices under a Water Quality Restoration Plan (WQRP) under Section E.6.</p> <p>A WQRP must be submitted by the Bard Coalition when water quality problems (exceedances in water quality objectives/benchmarks or trends in degradation) are identified by the Regional Water Board. The WQRP must identify existing</p>

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	<p>opportunity to cure any alleged violation prior to disclosure to the Board. As drafted, the Draft Order appears to place the coalition in a regulatory role over its members and could lead to the coalition impermissibly dictating management practices on behalf of the Board, contrary to Water Code section 13360. (See also Draft Order, p. 14.)”</p>	<p>management practices and then propose additional or improved management practices to prevent/minimize the discharge of any waste that is causing/contributing to the exceedance or trend of water quality degradation. The Regional Water Board expects that the Bard Coalition will work with its Members on the development and implementation of the WQRP. Because Coalition Groups are local entities with knowledge of agricultural practices used in the area, they are in best position to suggest what can be done to control water quality problems when they arise and to work with their Members. (ESJ Order, p. 20.)</p> <p>The Bard Coalition is not expected to be an “enforcement body,” but rather to function as a representative of its Members. Enforcement authority and discretion continues to rest exclusively with the Regional Water Board. A report by the Bard Coalition that a Member has failed to implement improved management practices pursuant to a WQRP will not automatically result in any administrative civil liability for the Member. If the Regional Board chooses to take any enforcement action against a Member, the Member will be afforded the due process required under the California Administrative Procedure Act and Water Code.</p> <p>Water Code section 13350 provides that any person who violates Waste Discharge Requirements (WDRs) such as the Bard Valley General Order may be: (1) subject to administrative civil liability imposed by the Regional Water Board or State Water Board in an amount of up to \$5,000 per day of violation, or \$10 per gallon if the discharge involves a discharge of pollutants; or (2) be subject to civil liability imposed by a court in an amount of up to \$15,000 per day of violation, or \$20 per gallon. The actual calculation and determination of administrative civil penalties must be set forth in a manner that is consistent with the State Water Board’s <i>Water Quality Enforcement Policy</i> (Enforcement Policy).</p> <p>The Enforcement Policy endorses progressive enforcement action for violations of WDRs when appropriate but recommends</p>

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		<p>formal enforcement as a first response to more significant violations. Progressive enforcement is an escalating series of actions that allows for the efficient and effective use of enforcement resources to: (1) assist cooperative Members in achieving compliance; (2) compel compliance for repeat violations and recalcitrant violators; and (3) provide a disincentive for noncompliance. Progressive enforcement actions may begin with informal enforcement actions such as a verbal, written, or electronic communication between the Regional Water Board and a Member. The purpose of an informal enforcement action is to quickly bring the violation to the Member's attention and to give the Member an opportunity to return to compliance as soon as possible. The highest level of informal enforcement is a Notice of Violation.</p>
BHFS -3.4	<p>"If the coalition can elect to disclose members' identities directly to the Board, without notice, the members have no reason to trust the coalition will maintain the confidentiality of the information provided. (See also Draft Order, § E.5.c.ii.4 [allowing the Board's Executive Officer to require a coalition to disclose individual member data in connection with a Water Quality Restoration Plan, without notice or a public process].) These disclosures permit disclosure of member information, without notice, which defeats the purpose of a coalition."</p>	<p>Please see the response to comment BUCG-1.6.</p>
BHFS -3.5	<p>"[T]he Draft Order does not indicate what consequences there will be for a member whose identity is disclosed to the Board. For instance, the coalition may disclose a member to the Board that fails to 'participate in studies.' (Draft Order, p. 19.) It is unclear the type and scope of 'studies' that a coalition can undertake and how the Board plans to enforce participation in such studies. The Board's enforcement authority in this regard should be clarified, especially in light of the ambiguity surrounding the 'studies' contemplated by the Draft Order."</p>	<p>The studies could relate to preparing reports that the Bard Coalition is responsible for as a representative of its Members, such as the preparation of Annual Monitoring Reports, INMP Summary Reports, and investigations of water quality problems under a Water Quality Restoration Plan.</p> <p>Please also see the response to comment BHFS-3.3 concerning the enforcement authority of the Regional Water Board.</p>
BHFS -3.6	<p>"Section F.7 (Inspection and Entry) details inspection and entry provisions that allow the 'Colorado River Board, or authorized individual, upon presentation of credentials and other documents</p>	<p>As written, the language of Section F.7 of the Bard Valley General Order is fully consistent with the requirements of Water Code section 13267(c). The reference to the need to present</p>

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	<p>as may be required by law' to, among other things, enter property and inspect records. (Draft Order, p. 25) This section should specify the justification that the Board must provide to enter a property (e.g., suspected violation) and what individuals or entities could constitute an authorized individual." As drafted, this section suggests a member has no right to refuse entry and require the inspector to obtain a warrant. (See, e.g., Water Code, § 13267(c).)</p> <p>We request that the Board adopt the language from the Section IV.B.13 of the East San Joaquin Order, which was approved by the State Board in Water Quality Order 2018-0002. This language better informs dischargers of their due process rights."</p>	<p>"other documents as may be required by law" encompasses the need to provide a warrant if consent to enter is refused. Staff notes that the language is standard and used in almost every permit issued by the Regional Water Board.</p> <p>In response to this comment, staff proposes adding a reference to the relevant statutory provision and revising Section F.7 of the Bard Valley General Order as follows:</p> <p>"Consistent with Water Code section 13267, subdivision (c), Dischargers and Coalition Group(s) shall allow the Colorado River Basin Water Board..."</p>
BHFS -3.7	<p>"Appendix B (Monitoring & Reporting Requirements), Section IV.B.2 (Drinking Water Supply Well Monitoring - Continued Testing) specifies that the Board's Executive Officer can adopt an alternative drinking water supply well sampling schedule based on trending data for a well 'at any time.' (Appendix B, p. 6.) Again, the Draft Order does not specify notice procedures, the scientific evaluation to make this determination, or any limitations on the frequency of testing. Instead, the Draft Order gives the Executive Officer open-ended authority to require drinking water supply well monitoring. This authority could be wielded in an arbitrary and capricious manner against specific dischargers and without a scientific basis. Accordingly, the Board should clarify specific procedures for the Executive Officer to adopt more stringent drinking water supply well monitoring."</p>	<p>Pursuant to Water Code section 13267, the Regional Water Board may require that any person who has discharged, discharges, or is suspected of having discharged or discharging waste within its region that could affect the quality of waters within its region to furnish technical or monitoring program reports which the Regional Water Board requires.</p> <p>In the Colorado River Basin Region, authority to issue Water Code section 13267 investigative and monitoring orders has been delegated by the Regional Water Board to the Executive Officer. (Resolution No. 70-15; see generally Wat. Code, §13223(a) [Water Code § 13267 orders not included in list of non-delegable orders].) Moreover, there is no statutory requirement that Water Code section 13267 orders be issued with notice and a hearing. (Compare Wat. Code, § 13267 [no hearing required] with Wat. Code, § 13167.5 [listing types of orders for which a hearing is required, which includes WDRs issued under section 13263]; see also Wat. Code, § 13307.5 [specifying 30-day comment period for cleanup proposals].)</p> <p>If a discharger is dissatisfied with adjustments to the monitoring program issued by the Executive Officer under Water Code section 13267, the discharger may appeal that change to the State Water Board. (Wat. Code, § 13320(a).) If the State Water Board denies review, the issued order is deemed final and the</p>

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		party may challenge the order through a petition for mandate in the trial court. (<i>People ex rel. Cal. Regional Wat. Quality Control Bd. v. Barry</i> (1987) 194 Cal.App.3d 158, 177; see Wat. Code, § 13330(b).)
BHFS -3.8	<p>“Section IV.B.4 (Drinking Water Supply Well Monitoring - Exceedances) requires that if groundwater monitoring determines that a drinking water well exceeds 10 mg/L of nitrate+nitrite as N, the coalition member must provide notice to drinking water users within ten (10) days of learning of the exceedance and send a copy of the notice to Board. (Appendix B, p. 6.) However, if the coalition member is not the landowner, the member must provide notice instead to the landowner within 24 hours, and the landowner must provide notice to the users within nine (9) days and send a copy of the notice to the Board. This notice process is complicated and imposes timely disclosure requirements on multiple parties, including potentially remote landowners. Practically, this notice approach requires landowners to maintain a list of drinking water well users for any drinking water well on their property, and imposes a notice requirement on a landowner that may not be part of a coalition and may not be active in ongoing operations. The Board should evaluate whether an easier or more feasible method can achieve the same result. The Draft Order ought to allow for more flexible notice strategy that gives landowners, members and coalitions options to notice drinking water users within the same timeline.”</p>	<p>Comment noted. These exact requirements were approved by the State Water Board in the Eastern San Joaquin Order. The requirements may indeed cause landowners to keep better track of drinking water wells on their property, but staff does not view this as a negative consequence. Moreover, the commenter does not actually propose any alternative to the requirements in the Bard Valley General Order. Staff does not recommend any changes in response to this comment.</p>
BUCG - 4.1	<p>“[I]t was pointed out that ‘the monitoring and reporting program failed to acknowledge wastewater discharges consisting of comingled waters from sources not regulated by the Conditional Waiver. These unregulated sources include agricultural discharges from tribal lands, interceptor drains and the All-American Canal. With the Bard Unit drainage system bordering tribal lands used for agricultural purposes, the Conditional Waiver does not provide a contingency plan to address issues that may arise from comingled drainage wastewater.’ Additionally, there is no discussion of the comingling of groundwater with the land mentioned above as well as the state of Arizona which borders</p>	<p>The Bard Valley General Order prohibits waste discharges from Irrigated Agricultural Lands in the Bard Unit from causing or contributing to an exceedance of applicable water quality objectives. The Order does not require agricultural dischargers to cure legacy pollution or pollution generated by other categories of dischargers. Staff does not propose any revisions to the Bard Valley General Order in response to this comment and did not intend to convey that revisions would be made in any meeting with the Bard Coalition.</p> <p>Any issue with “commingling” of wastewater is hypothetical at</p>

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	<p>Bard to the east.</p> <p>In response to the comments submitted in 2014 the Board staff recommended, 'revising the agricultural waiver for Bard to include the issue of comingled waters at the next waiver renewal update.' In our discussion this week, Regional Board staff again noted our concerns and committed to addressing the comingling issue in the drafting of this Tentative Order. As private landowners in the Bard area have a small fraction of the overall influence to surface and groundwater of the area, under the existing draft, scenarios could exist where farmers in the Bard Unit area could be held accountable for compliance conditions that they did not create, nor have any influence over. It is critical that the development of any regulatory policies regarding surface and groundwater for the Bard Unit carefully consider this."</p>	<p>this point. If a water quality problem arises, the appropriate mechanism is for the Coalition Group to develop a Water Quality Restoration Plan.</p> <p>Please also see the response to comment BUCG-1.2.</p>
BUCG - 4.2	<p>"The Tentative Order specifies that annual nitrogen use reporting should be to the field level. As we discussed in our meeting, yield data is extremely proprietary information due to the highly competitive nature of the market. We also discussed that due to the short harvest windows for peak crop quality, market and pest conditions frequently arise that cause partial or entire fields to go unharvested. While growers do everything they can to produce high quality crops in an efficient manner, they have no control over market conditions. When these incidents occur, there will be exceedances of the A/R ratios when a grower might be doing an exceptional job of managing inputs. Additionally, there may be plantings of multiple crops within a 'field' in the Bard Valley as the size of plantings of each crop can be much smaller (less than 5 acres per planting) than permanent and/or semi-permanent broad acre crops grown in other areas. The reporting associated with this cropping structure exponentially increases the cost of compliance and reporting while disclosing specific yield information which potentially could be damaging in a highly competitive marketplace</p> <p>Regional Board staff indicated the following alternative would be considered regarding the development of Farm Plans and</p>	<p>Please see the response to comment BUCG -1.5.</p> <p>Staff suggests that the Bard Coalition submit a formal, written proposal for alternative reporting areas with a reasoned rationale and discussion of the relevant data/information for Regional Water Board staff to review. Regional Water Board staff will then recommend a decision to the Regional Water Board's Executive Officer, and the Bard Coalition has the option to appeal the Executive Officer's decision to the State Water Board.</p>

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	<p>nitrogen use reporting. The alternative would allow for annual crop reporting to be summarized by crop to the ranch level (provided the ranch is less than 640 acres in size). I urge you to adopt this alternative, as it would provide the Regional Board with a high resolution of detailed information for nitrogen use to the farm / crop level while implementing a practical reporting requirement for the growers in the Bard Unit. Reporting at the ranch level meets the needs of the Regional Board while being less burdensome than field scale reporting for the growers, and it reduces the potential for confounding, extremely complex information which staff will have to interpret each year.”</p>	
BUCG - 4.3	<p>“Staff welcomed the Bard Unit Coalition to assemble and present scientific research data to assist in the development of sound, crop specific ratios of Nitrogen applied to removal (A/R) data for the cropping systems in the Bard Valley. We committed to assemble the existing information and present this to the Regional Board for consideration.”</p>	<p>Comment noted.</p>
BUCG - 4.4	<p>“We are also in agreement with the Regional Board that monitoring of wells associated with drinking water should be monitored for three (3) years initially, and if levels of key constituents remain low (the levels which would be considered low were not defined) the monitoring requirement for these wells would be reduced to once every five (5) years. It was also noted by the Bard Unit Coalition that residents in the Bard Valley do not use well water for drinking due to natural occurring high mineral content of well water.”</p>	<p>Comment noted.</p>
BUCG - 4.5	<p>“In consideration of the pesticide constituents required for testing, the Bard Unit Coalition agreed to review the historical pesticide use data for the Bard area and work with Regional Board staff to develop a proposal of materials considered for annual surface and groundwater testing.”</p>	<p>Comment noted. Staff will work with the Bard Coalition to develop a list of pesticide constituents necessary for an informative pesticide monitoring program. Staff reserve the right to make the final decision regarding the pesticide constituents to monitor, subject to the approval of the Executive Officer.</p> <p>Please also see the responses to comments BUCG-2.2 and BUCG-2.3.</p>

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BUCG - 4.6	<p>“A concern that was not discussed during this meeting was the requirement for participation in research. While the majority of growers in the Bard Valley are proactive in evaluating new techniques and currently drive research to improve farming practices, there are growers who may not have the financial resources or personnel to participate in on-farm research. Under current wording, these individuals could be found in violation of the order if they fail to conduct research.”</p>	<p>It is unclear what on-farm research the commenter is referencing. The Bard Agricultural General Order does not require grower to participate in on-farm research.</p> <p>Please also see response to BHFS-3.4.</p>
ICFB -5.1	<p>“As currently drafted, Finding 1 states that all discharges from irrigated agricultural lands carry wastes. Given that not all discharges contain wastes and/or contain wastes that can affect the quality of waters of the states, the finding should be revised to add the qualifier ‘may’ before ‘carry wastes.’ Such an addition will allow Finding 1 to be consistent with other paragraphs within the Draft WDR, such as Finding 3 and Finding 46.”</p>	<p>In response to this comment, Regional Water Board staff proposes revising the following sentence in Finding 1, Page 1 of 27 as follows:</p> <p>“Discharges from irrigated agricultural lands, including leaching or runoff of irrigation water and/or stormwater, may carry wastes, including but not limited to, salts, nutrients, pathogens, sediments, and pesticides that can affect the quality of waters of the state.”</p>
ICFB -5.2	<p>“Although Attachment A’s inclusion of a non-exhaustive list of management practices dischargers may use properly reflects the prohibition on the dictation of management practices, provisions within the Draft WDR, specifically regarding water quality restoration plans, improperly prescribe and constrain management practices. (See Draft WDR, Finding 73; Provision D. 6(c)(iii).) Within the water quality restoration plan requirements, the plan must state what management practices will be implemented by dischargers. If a discharger fails to implement the exact practices listed in the plan, the discharger will be subjected to ‘direct regulation by the Colorado River Basin Water Board.’ (Draft WDR, Finding 73.) In essence, through listing a future management practice that the discharger will implement, the discharger is locked into a specific plan of action, thus preventing the discharger from utilizing new or more effective ‘available strategies to comply with that standard,’ especially if weather (drought, wind, etc.) or market conditions change. In order to allow dischargers the ‘freedom’ to properly employ effective management practices, the requirements associated with water quality restoration plans should be revised to allow</p>	<p>The Water Quality Restoration Plan (WQRP), as provided in Provision E.6.c of the Bard Valley General Order, does not improperly prescribe or constrain the discretion of individual growers to implement management practices.</p> <p>A WQRP must be submitted by the Coalition Group when water quality problems (exceedances in water quality objectives/benchmarks or trends in degradation) are identified by the Regional Water Board. The WQRP must identify existing management practices and then propose additional or improved management practices to prevent/minimize the discharge of any waste that is causing/contributing to the exceedance or trend of water quality degradation. The Regional Water Board reviews the proposed WQRP to ensure that the plan will address the exceedances or degradation within an appropriate time frame. After approval by the Regional Water Board’s Executive Officer, the plan is then implemented.</p> <p>Importantly, the plan is prepared and proposed by the Coalition Group, as a representative of its Members (i.e., agricultural</p>

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	<p>dischargers flexibility in implementing practices and should not subject them to direct regulation if a different practice than what is listed on the plan is ultimately implemented.”</p>	<p>dischargers), not by the Regional Water Board. The Regional Water Board does not dictate the management practices or improved management practices. Only if the improved management practices fail to address the water quality exceedance or degradation, or if the relevant dischargers fail to implement the management practices that they have proposed, will the Regional Water Board take “further direct regulation” through the issuance of individual waste discharge requirements (i.e., issuance of a separate permit) or enforcement actions.</p> <p>The WQRP process is intended to implement the State Water Board’s Nonpoint Source Policy. While the Nonpoint Source Policy allows reliance on management practice implementation to control sources of pollution, the policy requires a feedback mechanism whereby the implementation requirements are linked to expected water quality outcomes, and the program is <i>adaptively managed</i> to institute improved management practices where additional measures are needed to meet the water quality requirements. (See NPS Policy, Key Elements 2 and 4; ESJ Order, p. 31.) The WQRP in the Bard Valley General Order is an adaptive management program that complies with the requirements of the State Water Board’s Nonpoint Source Policy.</p> <p>Further, the Nonpoint Source Policy explicitly provides that management practice implementation is not a substitute for actual compliance with water quality requirements. Notably, the policy recognizes that any activity conducted pursuant to a management practice can be terminated or modified if the conducted activity results in a violation of water quality standards. (NPS Policy, p. 7.) As such, “direct regulation” by the Regional Water Board when improved management practices fail to achieve required water quality outcomes is appropriate and complies with the Nonpoint Source Policy.</p> <p>Regional Water Board staff propose adding a new subdivision (e) to Section E.6 of the draft Order as follows:</p>

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		<p>“e. The WQRP must be approved by the Colorado River Basin Water Board’s Executive Offer prior to implementation. The Coalition Group may propose changes and revisions to the WQRP as necessary, subject to approval by the Executive Offer prior to implementation.”</p> <p>The above provision should address the concern that there is no flexibility once the WQRP is adopted to make changes allowing agricultural dischargers to use “new or more effective” management practices.</p>
ICFB -5.3	<p>“As evidenced throughout the Draft WDR and Attachments, surface water and groundwater quality data collected by the Bard Coalition through its required Monitoring and Reporting Program and through additional studies do not show exceedances for nitrates. As included by the Regional Board, ‘Regional Water Board staff’s review of the surface water quality monitoring data collected by the Bard Coalition at the three locations indicate that most constituents in Table 2.1 do not exceed the numeric water quality objectives of the Basin Plan.’ (Draft WDR, Attachment A, p. 6.) Specifically, average total nitrogen samples ranged from 0.5 to 4.6 mg/L and average nitrate + nitrite (N) samples ranged from 0.3 to 4.0 mg/L</p> <p>Groundwater quality data taken from the Yuma Valley Groundwater Basin for the Colorado River Groundwater Ambient Monitoring and Assessment (GAMA) study show that ‘[t]he concentrations of most constituents detected in groundwater samples from the 5 grid wells were below drinking-water thresholds, but some constituents exceeded those standards. Total dissolved solids, chloride, iron, manganese, and sulfate were measured above the lower and upper ranges of the Secondary Maximum Contaminant Level (MCL) thresholds in most wells (Table 2.2).’ (Draft WDR, Attachment A, p. 8.) Given this data, a ‘demonstration’ has been made ‘that nitrogen applied to the fields does not percolate below the root zone in an amount that could impact groundwater and does not migrate to surface</p>	<p>Please see the response to comment BUCG-1.7.</p> <p>The Eastern San Joaquin Order provides that the authority to approve the referenced exemption rests with the Regional Water Board. (ESJ Order, p. 34.) In this response to comments and past response to comments on the Palo Verde General Order, the Regional Water Board has made suggestions as to what type of showing the Regional Water Board might find satisfactory. This does not constrain the ability of the exemption proponent to make any showing that the proponent desires in support of the exemption request. The Regional Water Board will evaluate all requests for exemption submitted.</p>

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	<p>water through discharges.’ (ESJ WDR, p. 34.) Therefore, the Draft WDR should incorporate the exemption from nitrogen management requirements and should be revised accordingly.</p> <p>We find it relevant to note that in Regional Water Board staff’s response to comments for the Palo Verde General Order, staff stated that ‘a comprehensive demonstration or study linking groundwater and surface water data to the conditions of the crop management and the local conditions (soil, geology, topology, hydrology) would be required.’ However, the actual language within the ESJ WDR does not specifically state that such a study must link groundwater and surface water data to conditions of crop management. Through the prior mentioned data, we believe the necessary demonstration has been made. Additionally, the Bard Unit Coalition Group has submitted a report with comprehensive information to continue this demonstration. Therefore, an exemption from nitrogen management requirements should be incorporated into the Draft WDR.”</p>	
ICFB -5.4	<p>If nitrogen management requirements are included in the Draft WDR, the Coalition is required to determine, through literature review, nitrogen removed testing, and research, the most appropriate CN coefficients for converting crop yield to Nitrogen Removed. CN coefficients can vary greatly based on geographic location, soil type, cultural growing practices, and more. It is important to note that the CN coefficients for a crop in another location, like the Central Valley, will not be the same for that same crop grown in the Bard Valley. Substantial work would need to be done to adjust coefficients. In many cases, in order to have applicable data to allow for proper analysis, studies would need to be done to find the coefficients. Studies like this would cost thousands of dollars per crop and would require many more years than the timeline set out in Attachment B of the Draft WDR. The March 1, 2023 and March 1, 2024 deadlines for CN coefficients should be extended in order to give the coalition more time to develop numbers that will allow correct analysis to be done regarding nitrogen removed.</p>	<p>The deadlines for a few of the INMP requirements are set for 2023 and 2024 to allow time for the Bard Coalition to develop its program. Staff will work with the Bard Coalition to develop the program. It is unclear at this time if the Bard Coalition will need a time extension to develop nitrogen removal coefficients. Staff does not propose any changes in response to this comment.</p>

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ICFB -5.5	<p>The Draft WDR relies upon the environmental analysis conducted in the negative declaration for the 2013 Conditional Waiver. Given the changes in baseline and regulatory conditions, such as the establishment of the Sustainable Groundwater Management Act, the increase in regulatory requirements within the Draft WDR in part due to the precedential requirements from the ESJ WDR and its associated increase in costs, and the change in a program from a conditional waiver to a WDR, a new environmental review should take place. These new components and associated impacts were not thoroughly considered previously and may result in the imposition of new burdens on irrigated agricultural operations that will have a significant and cumulatively considerable impact on the environment. This is especially pertinent because the environmental and regulatory baseline in 2019 is very different than the baseline in 2013. Thus, the Regional Water Board should not rely upon data compiled and analyzed in a CEQA document over 6 years ago. Analysis needs to be done by the Regional Water Board to determine whether increased regulatory costs will result in land being fallowed or taken out of production.</p>	<p>The 2013 Negative Declaration prepared and adopted for the 2013 Bard Conditional Waiver describes the potential environmental impacts associated with implementation of water quality management practices, construction of monitoring wells, and impacts to agricultural resources (e.g., loss of production of prime farmland). The Bard Valley General Order is substantially similar to the 2013 Bard Conditional Waiver and continues the program, with the only difference being the addition of new or revised monitoring and reporting requirements. These new or revised monitoring and reporting requirements will not result in an adverse physical change to the environment. Nor are there substantial changes in the surrounding circumstances which would require major revisions to the 2013 Negative Declaration or significant new information, as that term is used in CEQA.</p> <p>Consistent with California Code of Regulations, title 14, section 15162, the Regional Water Board has determined that no subsequent environmental document needs to be prepared because there are no new significant adverse environmental effects, no substantial increase in the severity of previously-identified significant effects, nor any mitigation measures or alternatives that are considerably different than those analyzed in the prior environmental documentation.</p> <p>For clarity, Regional Water Board staff propose revising Finding 76 as follows:</p> <p>“Therefore, the 2013 Negative Declaration for the 2013 Conditional Waiver constitutes the environmental analysis under CEQA for this Order and no subsequent environmental document is required pursuant to California Code of Regulations, title 14, section 15162.”</p>
ICFB -5.6	<p>“General Provision F. 7, regarding inspection and entry by the Regional Water Board, should be revised to correctly reflect the required element of consent as outlined in Water Code section 13267(c). Water Code section 13267(c) states that any inspection “shall be made with the consent of the owner or possessor of the</p>	<p>Please see the response to comment BHFS-3.6.</p> <p>The Regional Water Board reserves the right to enter onto Irrigated Agricultural Lands enrolled under the Bard Valley General Order. Consistent with Water Code section 13267(c),</p>

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	<p>facilities or, if the consent is withheld, with a warrant duly issued pursuant to the procedure set forth in Title 13 Code of Civil Procedure Part 3 (commencing with section 1822.50). However, in the event of an emergency affecting the public health and safety, an inspection may be performed without the consent or the issuance of a warrant.” As currently drafted, Provision F. 7 does not allow a discharger to consent or refuse inspection and entry and should be revised.</p> <p>In the past, Regional Board staff has agreed that there would not be entry onto farmers’ fields. Instead, the coalition would work with growers personally to resolve any issues. Allowing access to a field without consent or even notification to the grower brings forward concerns for our members, especially regarding food safety.”</p>	<p>Regional Water Board staff would not enter a property without consent, unless the Regional Water Board staff first obtains a warrant.</p>
ICFB -5.7	<p>“The Draft WDR requires the submittal of individual Farm Plans to the Coalition Group by March 1, 2020 and by March 1 annually thereafter. (Draft WDR, p. 15.) The State Water Board discussed the importance of farm plans in the ESJ WDR, stating: ‘The Farm Evaluations are the mechanism for identification of the on-farm management practices implemented to achieve the General WDRs’ management practice performance standards. As such, they constitute an essential component of the General WDRs. However, we find that annual submission of the Farm Evaluations is necessary only when water quality problems indicate the need for iterative updating of implemented management practices.’ (ESJ WDR, pp. 28-29.) The State Water Board went on to say given that ‘most implemented management practices otherwise remain fairly stable from year to year, the State Water Board “require[ed] submission of the Farm Evaluations only every five years for Members in both high vulnerability areas and low vulnerability areas, except where the Executive Officer determines that more frequent reporting is warranted.’ (ESJ WDR, p. 29.) When implemented management practices remain stable from year to year, we request that annual submissions are not required.”</p>	<p>Comment noted. The Water Quality Management Plan (Farm Plan) requirements in the Bard Valley General Order are similar to the Farm Plans that were required under the expired 2013 Bard Conditional Waiver and submitted to the Regional Water Board every year. The Eastern San Joaquin Order notes that the regional water boards have the discretion to require more frequent reporting of the Farm Plans. (ESJ Order, p. 29.) The irrigated lands regulatory program is not as well developed in Bard Valley as in the Eastern San Joaquin watershed; further, as a practical matter, many growers in the Eastern San Joaquin watershed will submit management practice information on a frequency greater than every five years, as growers in areas covered by certain management plans must submit separate management practice implementation reports (ESJ Order, p. 68). Staff believes that initially obtaining the information on the Farm Plan and any changes to it on an annual basis are crucial to establishing a regulatory baseline and ensuring that surface and ground water quality are maintained. In the future, the frequency of this reporting requirement may be reexamined.</p>

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ICFB -5.8	<p>“Additionally, March 1st is referenced as the deadline provided in the Draft WDR for members to submit an individual Farm Plan to the Coalition Group. That same date is used as the deadline for the Coalition to submit management practice implementation data to the Colorado River Basin Water Board. Placing both due dates on the same day does not provide the Coalition ample time to prepare the report. For example, permanent and perennial crops as well as fallowed land are examples where annual submissions may not be necessary.”</p>	<p>In response to this comment, Regional Water Board staff proposes changing the annual deadlines for the Bard Coalition monitoring and reporting submittals from March 1 to April 1 to allow time for the Coalition to assemble data from its Members. These changes are reflected in the revised draft Bard Valley General Order dated June 28, 2019.</p> <p>Staff also notes that the Bard Coalition has the discretion to request submission of Farm Plan and INMP information from its Members at an earlier date than March 1.</p>
ICFB -5.9	<p>“Regulatory pressure is a source of increasing concern to the California agricultural industry. A recent Cal Poly, San Luis Obispo study titled ‘A Decade of Change: A Case Study of Regulatory Compliance Costs in the Produce Industry,’ studied the increase in the cost of regulatory compliance between 2006 and 2017 for a commercial-scale head lettuce grower in the Salinas Valley. In the decade since 2006, new rules at both the state and federal levels have imposed significantly higher regulatory burdens on growers, specifically with respect to food safety, water quality, labor wages, air quality; and worker health and safety. Additional regulations are in process as the Sustainable Groundwater Management Act is developed at the local levels for implementation in 2022, and minimum wage and overtime laws for farmworkers are phased in, also by 2022. In 2006, the studied grower reported regulatory costs totaling \$109.16 per acre, or 1.26% of total production costs. In 2017, the same grower reported regulatory costs totaling \$977.30 per acre, or 8.90% of total production costs. The results of this case study show that, for this lettuce grower, production costs have increased by 24.8% from 2006 to 2017, but the costs of regulatory compliance have risen by 795%. While the study was done with a grower in the Salinas Valley, one can assume very similar costs and changes throughout other areas of California, including Bard Valley.</p> <p>The Draft WDR will result in additional regulatory costs being imposed on our Bard Valley farmers. The added financial burden</p>	<p>Please see the response to comment BUCG-1.4.</p> <p>Please also note that the Regional Water Board must implement the precedential requirements of the Eastern San Joaquin Order, even if this increases the costs of compliance for permittees.</p>

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	<p>to our farmers, especially the smaller growers on ‘family farms’ may force agriculture out of the State, leaving the large workforce (and their families) not trained for other jobs; these are all issues that should be analyzed and addressed before adoption of a plan. When implementing a regulation, there must be a cost benefit analysis done to show that the environmental benefit outweighs the economic burden; with the Draft WDR, we do not feel that this is the case.”</p>	